

Supreme Court, U. S.  
FILED

In The

SEP 3 1976

SUPREME COURT OF THE UNITED STATES

**MICHAEL ROBAK, JR., CLERK**

No. **76-41**

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FIRST NATIONAL BANK OF HOLLYWOOD, DOROTHY  
BUCHMAN and SANDER BUCHMAN, as Executors  
of SAMUEL BUCHMAN, Deceased.

Petitioners,

-against-

AMERICAN FOAM RUBBER CORP., MILTON R. ACKMAN,  
as Trustee of American Foam Rubber Corp.,  
Bankrupt,

Defendants,

MARIE LOUISE de MONTMOLLIN, ALEXANDER F.  
PATHY and SUZANNE M. PATHY,

Defendants-Respondents.

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ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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RESPONDENTS' BRIEF IN OPPOSITION

[REDACTED]

[REDACTED]

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In The  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1976

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No.

FIRST NATIONAL BANK OF HOLLYWOOD, DOROTHY  
BUCHMAN and SANDER BUCHMAN, as Executors  
of SAMUEL BUCHMAN, Deceased,  
Petitioners,

-against-

AMERICAN FOAM RUBBER CORP., MILTON R.  
ACKMAN, as Trustee of AMERICAN FOAM RUBBER  
CORP., Bankrupt,

Defendants,

MARIE LOUISE de MONTMOLLIN, ALEXANDER F.  
PATHY and SUZANNE M. PATHY,

Defendants-Respondents.

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ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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RESPONDENTS' BRIEF IN OPPOSITION AND  
CONDITIONAL CROSS-PETITION FOR WRIT  
OF CERTIORARI

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Defendants-Respondents, MARIE

LOUISE de MONTMOLLIN, et al. ("defendants")  
oppose the granting of the petition for  
certiorari for the reasons stated briefly  
below. In the alternative, and in the  
event that the petition of plaintiff is  
granted, defendants respectfully cross-  
petition for a writ of certiorari to review  
the portion of the order of the court below  
dealing with "The Loan Transaction". As  
authority for such cross-petition, defendants  
respectfully refer to Pierson v. Ray, cert.  
granted, 384 U.S. 938, decided on merits,  
386 U.S. 547 (unreported chronology discussed  
in 1 West's Federal Forms §280 (1969)).

The Petition Was Not  
Timely Filed

On March 26, 1976 the court below  
denied motions to reargue. The time to file  
a petition for certiorari expired on the  
ninetieth day thereafter, June 24, 1976. The  
petition herein was filed on or about July 13,  
1976. For that reason alone it must be denied.

The Petition Is Without Merit

Rule 19 of the Supreme Court

Rules provides that:

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

The first four of plaintiff's "Reasons For Granting Writ" require no extended answer. It is probably correct that "[t]he legal issue in this case is one of first impression", but that is no ground for granting the writ. The second, third and fourth reasons are hardly more than chatter, more appropriate for a business column in a newspaper than for a petition for certiorari.

The fifth reason is the alleged conflict among circuits. It is purportedly based upon reported cases. Typical of the cases cited is Bank of America Nat'l Trust

& Sav. Ass'n v. Erickson, 117 F.2d 796

(9th Cir. 1941). It is not "in conflict with" the decision plaintiffs request this Court to review. It is one of dozens of decisions upholding the power of a bankruptcy court to subordinate claims on legal or equitable grounds. None of the other cases cited poses any conflict.

The decision below is not in conflict with "the commercial and historical development of the subordination agreements and judicial holdings." On the contrary, if a pattern can be traced, it is one calling for writers of subordination agreements to state the rights and duties of the parties with increasing care and particularity, and not to foist upon courts the obligation to write in additional provisions. As the court below, after referring to "the remote chance that bankruptcy might someday occur and the senior creditor might

thereafter be deprived of a double dividend", stated:

We think that if the senior creditor would prohibit a discharge because of such remote contingencies, he should so provide in the subordination agreement.

Conditional Cross-Petition For  
Writ of Certiorari To The United  
States Court Of Appeals For The  
Second Circuit

Defendants petition for a writ of certiorari to review "The Loan Transaction" portion of the judgment of the United States Court of Appeals for the Second Circuit, the writ to issue, however, only in the event that this Court grants the petition for writ of certiorari in No. , this Term.

Question Presented

Whether the court below erred in holding that the loan transaction was not a

series of bookkeeping entries between parent and subsidiary and therefore that payment had occurred.

Statement

Defendants-petitioners rely on the statement of the Loan Transaction of the United States District Court, Southern District of New York, as set out in plaintiff's petition Appendix B at 36a-38a.

Reason For Granting  
The Writ

Set out herein is a brief in opposition to plaintiff's petition for a writ of certiorari, setting forth the reasons why that issue does not warrant review by this Court. While the question posed in this cross-petition does not call for independent review by the Court, it nevertheless should be reviewed if, but only if, the Court grants the petition in

No. , this Term. Substantial justice requires that the two transactions, litigated together for sixteen years and inextricably tied by the facts, including Buchman's conspiracy, be ruled on together by this Court, if it is to rule on one of them.

#### Conclusion

For the foregoing reason, it is respectfully submitted that, if the Court grants the petition for writ of certiorari in No. , this Term, then in the interest of justice, it should also grant this conditional cross-petition for a writ of certiorari.

Respectfully submitted,

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